**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **LUCAS R. DRAKE** | ) | |
| Claimant | ) | |
| | ) | |
| VS. | ) | |
| | ) | |
| **THAYER AEROSPACE MANUFACTURING** | ) | |
| Respondent | ) | Docket No. 1,033,415 |
| | ) | |
| AND | ) | |
| | ) | |
| **LIBERTY MUTUAL INSURANCE COMPANY** | ) | |
| Insurance Carrier | ) | |

## ORDER

Respondent and its insurance carrier (respondent) request review of the April 12, 2007 preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

## ISSUES

Despite claimant's earlier left knee surgery, the Administrative Law Judge (ALJ) found that claimant established that his recent fall and subsequent left knee complaints, including the need for surgery, arose out of and in the course of his employment. Consequently, he granted claimant's request for ongoing medical treatment with Dr. Miller[1].

The respondent requests review of this decision alleging claimant's left knee injury, while occurring at work, was the mere result of walking or idiopathic injury and therefore not compensable. Respondent also argues that claimant's knee injury was the natural, direct and probable consequence of his pre-existing knee condition and that the ALJ's decision to award benefits should be reversed.

[1] Claimant requested temporary total disability benefits, but the ALJ without explanation, deferred that decision for the Regular Hearing.

Claimant argues the ALJ's factual and legal conclusions were correct and should be affirmed in all respects.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant underwent surgery to his left knee on December 5, 2006. Dr. Chris Miller performed an arthroscopic repair of claimant's left meniscus. Following that surgery, claimant had physical therapy and by eary February 2007, he had returned to work and was recovering, wearing only a sleeve on his knee as a precaution. He was still under the care of his orthopaedic surgeon, Dr. Miller, but it is undisputed that claimant was performing his regular work duties without difficulty.

On February 12, 2007, claimant reported to work and was walking to the refrigerator to store his lunch. As he turned from the refrigerator pivoting on his right leg, claimant testified that as he began to step with his left foot, and slipped on dust or debris, causing him to forcefully put his left foot down to avoid falling. Immediately thereafter, claimant experienced swelling in his left knee inside the knee brace.

The accident was reported to his supervisor and claimant was referred to Dr. Mark Dobyns for an evaluation. Dr. Dobyns referred claimant to Dr. Miller for further diagnosis and treatment.

When claimant returned to Dr. Miller he had significant and continuous left knee complaints, so much so that a full examination was difficult. Following diagnostic testing, Dr. Miller concluded that claimant required surgery to repair a retorn left medial meniscus. When respondent refused to provide treatment, claimant went ahead with the surgery. His recovery was uneventful and he has now returned to work. Nonetheless, the compensability of this claim remains in dispute.

Respondent maintains claimant's left knee injury is not compensable because it was caused by a normal day to day activity and did not "arise out of" his employment. An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[2] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[3]

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[2] K.S.A. 2005 Supp. 44-501(a).

[3] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

The phrase “out of” employment points to the cause or origin of the worker’s accident and requires some causal connection between the accident and the employment. An accidental injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the resulting injury. An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.[4]

There is no dispute that claimant was injured while on respondent's premises during his workday. Thus, he has established the injury occurred "in the course of" his job. But respondent contends the accident did not arise "out of" claimant's employment and was nothing more than a personal risk or an activity of daily living and thus, his recent accident and resulting need for surgery is not compensable.[5] Respondent explains its position as follows:

> In the case at bar, claimant's alleged February 12, 2007 left knee injury did not arise out of his employment because the injury was caused by a normal activity of daily living; walking. The claimant simply turned on his right leg and put weight on his left leg after placing his lunch in the refrigerator before work. He did not twist his knee or fall to the ground, nor was he in a hurry.[6]

The flaw in respondent's argument is the fact that claimant testified that he slipped on dust or other particulate present in the workplace. Although respondent seems to suggest in its brief that there was no substance on the floor because the floor is swept at the end of each shift, claimant’s recitation of the floor’s condition and the cause of his fall is uncontroverted by testimony. Thus, the ALJ concluded that it was a condition of the workplace that led to his accident and resulting injury. This member of the Board finds the ALJ was correct and should be affirmed.

Respondent contends that claimant’s accident arose as a result of an activity of day-to-day living, namely walking, and is therefore excluded as a compensable injury. Although walking can be described as a normal activity of day-to-day living, K.S.A. 44-508(e) does not exclude “accidents” that are the result of such activity, but rather excludes injuries where the “disability” is a result of the natural aging process or the normal activities of day-to-day living. Here, a condition of the workplace led to the aggravation of claimant’s earlier knee injury. Thus, claimant’s injury did not occur because of an activity of day-to-day living. Rather, he was walking and slipped on dust on the floor of his employer’s facility, causing a re-injury of his left knee. And as such, his accident is compensable.

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[4] *Id.*

[5] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, 147 P.3d 1091, *rev. denied* 281 Kan. (2006).

[6] Respondent’s Brief at 5 (filed May 4, 2007).

Finally, respondent asserts that "where there is a prior non-work related injury that has not fully healed [any] aggravation of the same injury by a subsequent work related incident is the natural consequence of the original injury and thereby does not arise out of claimant's employment."[7] This bold statement is unsupported by any case law and this Board Member finds it to be inaccurate.

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[8] The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.[9]

Here, the only evidence available to the ALJ (and this Board Member) are the written medical reports. Those reports indicate claimant suffered a retear of his left medial meniscus as a direct result of the February 12, 2007 accident. Up until that point, he had been working his regular duties and suffering no significant problems with mobility or pain. Immediately after his slip at work, he had swelling and pain which continued until the meniscus was surgically repaired.

Like the ALJ, this Board Member has no difficulty finding that claimant sustained an acute aggravation of his pre-existing knee condition. Accordingly, the ALJ's preliminary hearing Order is affirmed in all respects.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[10] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

**WHEREFORE**, it is the finding, decision and order of this member of the Board that the Order of Administrative Law Judge Thomas Klein dated April 12, 2007, is affirmed.

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[7] *Id.* at 8.

[8] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984)*; Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

[9] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

[10] K.S.A. 44-534a.

**IT IS SO ORDERED.**

Dated this _____ day of June, 2007.

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BOARD MEMBER

c: Gary K. Albin, Attorney for Claimant
Jason J. Montgomery/James P. Wolf, Attorneys for Resp. and its Ins. Carrier
Thomas Klein, Administrative Law Judge